(12)

No. 90-1912

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STEPHANIE NORDLINGER,
Petitioner,
v.
KENNETH HAHN, in his capacity as Tax Assessor for Los Angeles County, and the COUNTY OF LOS ANGELES,
Respondents.

On Writ of Certiorari to the Court of Appeal of the State of California Second Appellate District

---

BRIEF AMICI CURIAE OF THE BUILDING INDUSTRY ASSOCIATION OF SOUTHERN CALIFORNIA, INC. AND THE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONER

BRENT N. RUSHFORTH *
BRUCE J. ENNIS, JR.
ANTHONY C. EPSTEIN
ANN M. KAPPLER
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000
Counsel for Amici Curiae BIA and NAHB

December 23, 1991

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

STATUTES

CONSTITUTIONS

MISCELLANEOUS PUBLICATIONS

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

No. 90-1912

STEPHANIE NORDLINGER,
Petitioner,
v.
KENNETH HAHN, in his capacity as Tax Assessor for Los Angeles County, and the COUNTY OF LOS ANGELES,
Respondents.

On Writ of Certiorari to the Court of Appeal of the State of California Second Appellate District

BRIEF AMICI CURIAE OF THE BUILDING INDUSTRY ASSOCIATION OF SOUTHERN CALIFORNIA, INC. AND THE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONER

INTEREST OF AMICI [1]

Amicus curiae Building Industry Association of Southern California ("BIA") is a non-profit trade association whose more than 2200 individual and company members produce the great majority of new housing in the South-

[1] Petitioner and respondents both have consented to the filing of this *amicus* brief. Their letters of consent are being lodged with the Clerk.

ern California area—the Nation's largest market for residential housing. The BIA and its members are dedicated to providing new housing at affordable prices. This objective has become increasingly difficult to achieve during the past decade,[2] and has been made drastically more difficult by the "welcome stranger" provision of Article XIIIA of the California Constitution, popularly known as Proposition 13.[3]

Amicus curiae the National Association of Home Builders ("NAHB") is a non-profit trade association representing over 153,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single family homes but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers. The NAHB is the voice of the American shelter industry. Its mission is to enhance the climate for housing and the building industry and to promote policies that will keep housing a national priority. Chief among its goals is providing and expanding opportunities for all consumers to have safe, decent and affordable housing. This goal demands that the NAHB assist the challenge to Proposition 13's welcome stranger provision.

---

[2] The percentage of employed Californians who can afford the average-priced home is under 20% and dropping. California Senate Office of Research, *California Housing: Who Can Afford the Price?* at 17 (1990).

[3] The phrase "welcome stranger" was coined by commentators as a sarcastic description of tax provisions—such as Proposition 13—that result in recently sold properties having disparately higher appraised values than comparable properties that have not been sold. Existing taxpayers "welcome" such newcomers—*i.e.* "strangers." *See, e.g.*, Crain's N.Y. Bus., April 7, 1989, at 8 col. 3 (letter to the editor); Winerip, *Howdy, Stranger, Have a Big Dose of Realty Tax*, N.Y. Times, April 11, 1989, at B1, col. 1; Norton, *The 'Welcome Stranger' Provision of Prop. 13 Clearly Is Unwelcome*, L.A. Times, Feb. 9, 1989, § 2, at 9, col. 1.

INTRODUCTION AND SUMMARY OF ARGUMENT

The BIA and NAHB strongly support the arguments made by petitioner Nordlinger: The welcome stranger provision of Proposition 13—which results in grossly and irrationally disproportionate taxation of similarly situated taxpayers—violates the equal protection guarantees of the Fourteenth Amendment to the United States Constitution. Property tax differentials of 1,000% and more, based solely on the date of purchase, cannot pass constitutional muster. Forcing recent purchasers to bear the brunt of inflation and to subsidize an ever-declining effective property tax rate for long-time owners violates the Equal Protection Clause. This unjust attempt at wealth redistribution cannot be sustained.

In this brief, *amici* address two narrow issues. First, the BIA and NAHB demonstrate the devastating effect Proposition 13's welcome stranger provision has had on new home construction in California. Second, *amici* address the Court's decision in *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, 488 U.S. 336, 344 n.4 (1989). That case cannot be read to infer constitutional significance from the fact that the property tax assessment policy struck down there was effectuated through a county's enforcement practices, whereas Proposition 13's virtually identical welcome stranger assessment policy is codified as part of the State's Constitution.

Compliance with the Equal Protection Clause of the United States Constitution cannot be determined by popular vote. The majority of citizens in a State cannot insulate discriminatory actions from federal constitutional scrutiny by adopting them through initiative or referendum rather than through the State's legislative or executive officials. Regardless of how a State decides to adopt discriminatory laws or practices, those laws and practices remain subject to review under a single federal constitutional standard. The method of adoption does not affect the degree to which the federally protected rights of the minority are abridged by the majority—or protected by the Constitution.

To permit the degree of constitutional scrutiny to depend on how a State adopts a discriminatory law or practice would violate fundamental principles of federalism. It would require federal judges to intrude into the political structure and processes of state government and to establish a hierarchy of state law-making procedures, with some more presumptively valid than others. Equal protection analysis correctly assumes that each State, consistent with Art. IV, § 4, has "a Republican form of government" and that the laws of the State therefore reflect the will of the majority. For purposes of federal constitutional analysis, a state constitutional amendment adopted directly by the majority through referendum or initiative is no more or less legitimate than a state statute or administrative practice adopted by officials in the legislative or executive branches of state governments.

ARGUMENT

I. PROPOSITION 13'S GROSSLY INEQUITABLE ASSESSMENT SYSTEM HAS EXACERBATED THE DIFFICULTY IN PROVIDING AFFORDABLE NEW HOME CONSTRUCTION IN CALIFORNIA.

Although Proposition 13 was passed in 1978 apparently as part of an effort to protect average homeowners from the threat of escalating property taxes, the taxation system it established is grossly unfair and inequitable. Proposition 13's unique method of assessment produces wide variations in the amounts of property tax paid on similar or even identical parcels of real property—favoring long-time owners and penalizing recent purchasers. Its impact is especially harsh on new homeowners, who generally find themselves paying 10, 15, and 20 times as much property tax as their stay-put neighbors.[4]

[4] Similarly, new businesses are faced with large differentials in property tax compared to their established competitors.

Even beyond this direct impact, Proposition 13 has generated extensive discriminatory impositions on new homeowners. The immediate result of Proposition 13 has been a dramatic loss of revenue for local governments, who historically have relied upon property taxes to fund the projects and services they provide their citizens.[5] Faced with the resultant fiscal inadequacies and Proposition 13's one percent cap on taxation rates, local governments have sought new sources of revenue. And this search has been implemented primarily at the expense of the newcomer.

Developer fees—monetary exactions or dedication requirements designed to mitigate the financial impact on local governments attributable to new development[6]—are a prime example of this phenomenon. Since the passage of Proposition 13, "the widespread increase in developer fees (estimated now at $3 billion annually) has been used by local governments as a source of local revenue."[7] In some areas, developer fees have reached $37,000 for a modest middle class home. For all categories of developer fees, California now leads the Nation in the percentage of its communities which impose such fees.[8] These fees are largely passed along to the purchasers of new homes, because they greatly increase the cost of new construction. Moreover, they are regressive. Because most developer fees are flat amounts, they fall more heavily—percentagewise—on less costly homes than on expensive

[5] In 1977, for example, 40 percent of local revenues in California were derived from property taxes. *Report of the Senate Commission on Property Tax Equity and Revenue to the California State Senate* at 17 (June 1991) (hereafter "Senate Report"). A copy of the Report has been lodged with the Court.

[6] *See generally* Cal. Gov't Code §§ 54990, 66000(b) (Deering 1991); Cal. Health & Safety Code § 17951 (Deering 1991).

[7] Senate Report at 48.

[8] *See* J.E. Frank & R.M. Rhodes, *Development Exactions* at 133-134 (1987 ed.).

ones, further worsening the affordability problem that is of particular concern to the BIA and NAHB.

II. THE PROCEDURAL DISTINCTIONS BETWEEN THE WEBSTER COUNTY ASSESSMENT PRACTICE STRUCK DOWN IN *ALLEGHENY* AND PROPOSITION 13'S "WELCOME STRANGER" PROVISION ARE WITHOUT CONSTITUTIONAL SIGNIFICANCE.

In *Allegheny*, the Supreme Court held that the inequitable property tax assessment practices of Webster County, West Virginia violate the Equal Protection Clause. The Assessor of Webster County, exercising the discretion conferred upon her by West Virginia law, valued real property on the basis of recent purchase price. With respect to property that had not recently been conveyed, the assessor based the value on a slight modification in previous assessments. *Allegheny*, 488 U.S. at 340. "This approach systematically produced dramatic differences in valuation between . . . recently transferred property and otherwise comparable surrounding land." *Id.* at 341. Because "the constitutional requirement is the seasonable attainment of a rough equity in tax treatment of similarly situated property owners," *id.* at 343, the Court held that the failure of the assessor's adjustments to correct the "relative underevaluation of comparable property in Webster County over time" denied the purchasers of new property the equal protection of West Virginia's laws. *Id.* at 346.

Specifically noting that California had "adopted a similar policy" in Proposition 13's welcome stranger provision, the Court added, in a footnote:

> We need not and do not decide today whether the Webster County assessment method would stand on a different footing if it were the law of a State generally applied, instead of the aberrational enforcement policy it appears to be.

Id. at 344 n.4.

Plainly, the *Allegheny* Court reserved the precise question presented by this case: whether Proposition 13, with its discriminatory property tax assessment policy that the Court has described as "similar" to Webster County's, violates the Equal Protection Clause. To the extent the Court's footnote statement can be read to suggest that the policy of the Webster County assessor might pose a less troublesome equal protection question were it implemented pursuant to explicit provisions in a state statute or constitution—as is Proposition 13's welcome stranger assessment policy—that reading is unfounded. The relative undervaluation of comparable property that was the touchstone of the constitutional infirmity in *Allegheny* is more extreme and more pervasive in California where a similar (or even harsher) assessment method is a mandated general state policy. It would turn established principles of equal protection on their head to conclude that it is more preferable for California to enact a discriminatory constitutional provision than for Webster County to utilize a discriminatory enforcement practice consistent with West Virginia's constitution and laws.

A. The Manner In Which a State Chooses to Formulate or Implement State Policy Is Irrelevant to Equal Protection Analysis.

There is no justification for treating state action differently, for equal protection purposes, based on the form it takes—least of all for affording Proposition 13 special deferential treatment. The text of the Fourteenth Amendment makes no distinction between state enforcement practices—"aberrational" or not—and more generally applied state enactments. The Fourteenth Amendment provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The mandate of equal protection applies simply to the "State," encompassing all branches of state government and all

manners in which the people of a State choose to act through their state government.

The Equal Protection Clause is unquestionably concerned with States' enforcement practices. But the drafters of the Fourteenth Amendment sought to forbid the enactment of discriminatory laws as well. As Senator Howard, one of the sponsors of the amendment, stated,

> This [equal protection clause] abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another.

6 C. Fairman, *History of the Supreme Court of the United States—Reconstruction and Reunion 1864-88*, at 1925 (1971).

The Court's equal protection cases have never distinguished between state enforcement actions and legislative enactments. The Court long ago made clear that the Equal Protection Clause serves "to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, *whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.*" *Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350, 352 (1918) (emphasis added). Nor has the Court treated enforcement practices as somehow more "suspect" than legislation. To the contrary, the Court has indicated that a state statute unconstitutional on its face might, in practice and operation, be shown not to violate equal protection guarantees. *Williams v. Vermont*, 472 U.S. 14, 27 (1985). The Court has examined the constitutionality of discriminatory executive, administrative and judicial behavior using the same equal protection analysis it applies to discriminatory state and local legislation. *See, e.g., Snowden v. Hughes*, 321 U.S. 1 (1944) (upholding state officers' administration of state statute); *Nashville Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. 362 (1940) (upholding property assessment practices of state agency); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (invalidating licensors' discretionary administration of municipal ordinance).[9]

In *Snowden*, the Court directly analogized administrative enforcement practices to legislative enactments in analyzing the constitutionality of the Illinois State Primary Canvassing Board's refusal to certify the election of a candidate for the state legislature. The Court ruled that the officials' actions were no more violative of the Equal Protection Clause "than if the Illinois statutes themselves" had mandated the action. 321 U.S. at 10. The Court observed that the practical effect of discriminatory "enforcement" action "is the same as though the discrimination were incorporated in and proclaimed by the statute . . . even though [the action] is neither systematic nor long-continued." *Id.* at 9-10. Consequently, the Court held, "the action of the Board is . . . subject to constitutional infirmity *to the same but no greater extent* than if the action were taken by the state legislature." *Id.* at 11 (emphasis added). This holding alone makes clear that Proposition 13, by virtue of its status as the codified law of California, is not presumptively more "constitutional" than was Webster County's assessment practice.

Nor does the fact that Proposition 13 was enacted through voter initiative—rather than by the California Legislature—render it meaningfully different for purposes of equal protection analysis from the Webster County assessment practice struck down in *Allegheny*.[10]

---

[9] Distinguishing between enforcement of state statutes and the statutes themselves is, in this context, too restrictive a view of state action. *See Nashville, Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. 362, 369 (1940) ("It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice cannot supplant constitutional guarantees, but it can establish what state law is.").

[10] The Webster County welcome stranger provision, although administratively imposed, was indirectly endorsed by a vote of the

The State, acting through a majority of the electorate, has no greater leeway in treating its citizens unequally than does the State when acting through legislation, administrative regulation, or an individual official. The Court has consistently agreed. Thus, in *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713 (1964), the Court held regarding a voter referendum:

> A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be. We hold that the fact that a challenged legislative apportionment plan was approved by the electorate *is without federal constitutional significance*, if the scheme adopted fails to satisfy the basic requirements of the Equal Protection Clause.

Id. at 736-37 (emphasis added). *Accord City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 488 (1985) ("[I]t is plain that the electorate as a whole, *whether by referendum or otherwise*, could not order . . . action violative of the Equal Protection Clause.") (emphasis added); *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkley*, 454 U.S. 290, 295 (1981) ("It is irrelevant that the voters rather than a legislative body enacted [this law] because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation.").

In expressly refuting any reliance on the fact that a challenged discriminatory initiative is enacted by vote of the State's electorate, the Court has explained:

> "[S]tate racial legislation would unquestionably enjoy overwhelming electorate approval in certain of our states, yet no one would argue that this factor could compensate for manifest inequity. It is too clear for argument that constitutional law is not a

---

people; the assessor is elected by popular vote every four years and the policy continued over multiple elective terms. *See* W. Va. St. § 3-1-17 (West 1991); *Allegheny*, 488 U.S. at 344 (noting that property tax disparities caused by welcome stranger scheme "have continued for more than 10 years with little change").

> matter of majority vote. Indeed, the entire philosophy of the Fourteenth Amendment teaches that it is personal rights which are to be protected against the will of the majority. . . . It is no answer to say that the approval of the [discriminatory policy] necessarily evidences a rational plan. The plaintiffs have a right to expect that the cause will be determined in relation to the standards of equal protection. Utilization of other or different standards denies them full measure of justice."

Lucas, 377 U.S. at 737 n.30, quoting *Lisco v. Love*, 219 F. Supp. 922, 944 (D. Colo. 1963) (Doyle, J., dissenting), *rev'd* by *Lucas*.

In sum, the fact that California has adopted its discriminatory property tax assessment policy through voter initiative does not lessen the rigor of equal protection analysis: The manner in which the State chooses to effectuate its discriminatory classification is irrelevant for purposes of equal protection analysis. A different view would effectively involve the federal courts in judging the propriety of the States' decisions regarding the method they use to formulate and implement their policies and laws—and inevitably result in federal courts dictating to States the methods they should use. This would be a clearly impermissible (and undesirable) intrusion into the workings of state governments.

Other than guaranteeing the States a "Republican Form of Government" in Article IV, the Constitution is silent regarding the structure of state government. The constitutional separation of powers mandate does not apply to the States: Citizens of States are free to act through their legislatures, administrative bodies and individuals, or judiciaries, or through the initiative and referendum process—as they see fit. "How power shall be distributed by a state among its government organs is commonly, if not always, a question for the state itself." *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937). "The Constitution of the United States . . . has

no voice upon the subject." *Id.* And the federal courts lack the power to involve themselves in the question. *Id.*[11] A determination by the Court that a policy incorporated by voter initiative into a state constitution should be re-reviewed under a more deferential equal protection analysis than an identical policy effectuated through the practices of county officials acting through delegated authority would impermissibly pressure States to adopt their laws by the favored procedures. Such interference would contravene the fundamental principles of comity and federalism embedded in our Constitution.

B. If Distinctions Are Drawn, Voter Initiatives May Be Entitled to Less Deference in the Equal Protection Context.

If the Court, contrary to the above argument, takes the unprecedented step of distinguishing between different forms of state action, the fact that Proposition 13's welcome stranger provision was enacted through voter initiative may make it *more* suspect than legislative enactments.[12]

In the context of equal protection challenges, the Court, when applying the rationality test, has generally deferred to the lawmakers' classification scheme. *See, e.g., City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). In part, the deferential approach is premised on a presumption that legislatures conduct hearings and have access to far greater information, and that legislatures are more competent factfinders and policymakers than courts. In addition, Article VI of the United States Constitution requires

[11] *See Pacific State Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (holding nonjusticiable the question whether State's use of voter initiative to enact a gross-receipts tax was consistent with a republican form of government).

[12] For a cogent and powerful argument that voter initiatives deserve a harder look than courts give legislative enactments, see J. Eule *Judicial Review of Direct Democracy*, 99 Yale L. Journal 1503 (1990) (hereafter "Eule").

all public officials—including state and local officials—to support the Constitution. Because legislators are obligated to assess the constitutionality of their enactments, those enactments are accorded some level of "presumption" that they are constitutional. Further, the legislature, periodically elected by democratic process, enacts statutes in a deliberative manner that (at least ideally) will temper the imposition of the will of the majority upon the minority and results in the attainment of the collective "common good." [13]

None of these factors is present with voter initiatives such as Proposition 13. Whatever may be said about the proficiency and accuracy of legislative fact-finding, the legislature has greater experience at culling facts, and greater resources for doing so, than the electorate.[14] In addition, Article VI does not impose the obligation of constitutional compliance on the electorate, and there is no reason to believe initiative campaigns typically focus on the measure's constitutionality. Most important, the electorate is not accountable to anyone, nor do the voters stand in a representative capacity which forces them to act in light of differing interests. An initiative enactment

[13] Notably, the California Legislature—or at least the Senate—has utilized its fact-finding resources to conduct a study of Proposition 13's impact. The Senate Commission assigned to this task concluded in June 1991 that Proposition 13 "has generated substantial inequities for property taxpayers," "offend[s] a policy of equal tax treatment for taxpayers in similar situations," and should be eliminated. Senate Report at 1, 9, *passim*. But because Proposition 13 is part of the state constitution, the Legislature's hands are effectively tied.

[14] The California Supreme Court long ago recognized that the vast majority of the voters do not carefully consider proposed initiative measures, have only the most superficial knowledge of their content, and do not know how it will probably affect their own (let alone others') interests. *Wallace v. Zinman*, 200 Cal. 585, 592, 254 P. 946, 949 (1927). *Accord Eule*, 99 Yale L. J. at 1508-09, 1569-71 (providing anecdotal evidence of same in relation to recent California initiatives).

does not involve a deliberative process that requires consideration of differing views and compromise. Rather, an iniative or referendum represents the uncompromised, unfiltered view of the bald majority, flexing its majoritarian will. Particularly in the context of equal protection analysis—where the entire doctrine is designed to protect minority interests—there is reason to be suspect of voter initiatives.[15]

C. Consistency With State Law Is Irrelevant for Purposes of This Court's Equal Protection Analysis.

In their briefs in opposition to the Petition for Certiorari, respondents and *amici* the Howard Jarvis Taxpayers Association ("HJTA") and Paul Gann's Citizens Committee ("PGCC") find their own meaning in footnote 4 to the Court's *Allegheny* opinion.[16] They argue that the distinction between Webster County's apparently "abberational enforcement policy" and Proposition 13's "generally applied" welcome stranger provision is that the Webster County assessor was acting contrary to state law whereas

---

[15] Proposition 13 is a prime example. It was born out of a "taxpayer revolt" after the California Legislature failed to pass several bills designed to relieve ever-increasing property taxes. *See* Senate Report at 25. But the tax "relief" Proposition 13 affords disproportionately favors those individuals who owned property at the time of its enactment, while forcing newcomers (many of whom were not part of the electorate when Proposition 13 was enacted) to pay a substantially greater share of the tax burden. These newcomers are an inchoate group. Not surprisingly, then, Proposition 13 tramples their interests.

[16] Mssrs. Jarvis and Gann were co-authors of Proposition 13. HJTA and PGCC were founded to defend Proposition 13. HJTA and Gann submitted an *amicus* brief in *Allegheny* asking that the Court reserve judgment on Proposition 13. *See* Brief *Amicus Curiae* of Howard Jarvis Taxpayers Association and Paul Gann's Citizens Committee in Opposition to Petition for Certiorari at 2 (hereafter "*Amici* Brief").

Proposition 13 *is* the state law.[17] This attempt to distinguish *Allegheny* is entirely misconceived.

First, contrary to respondents' and *amici*'s contention, the Webster County assessor was *not* acting contrary to West Virginia law in assessing recently purchased property based on purchase price, with relatively minor modifications in the outdated assessments of land that had not been recently sold. The Webster County Commission, sitting as a Board of Equalization and Review, repeatedly reviewed and approved the assessor's actions. *Allegheny*, 488 U.S. at 339. And the West Virginia Supreme Court specifically held that the decisions of the assessor and the Board did *not* violate the West Virginia constitution and statutes. *In re 1975 Tax Assessments Against Oneida Coal Co.*, 360 S.E.2d 560, 564 (W.Va. 1987). This Court did not second-guess the state Supreme Court's judgment on this issue of state law. To the contrary, the Court explicitly noted that the assessments at issue "may fully comply with West Virginia law." *Allegheny*, 488 U.S. at 345.[18] Thus, the distinction respondents and *amici* seek to draw rests on an erroneous assumption.

Moreover, as the *Allegheny* decision itself demonstrates, whether the state action at issue comports with state law is irrelevant to federal equal protection analysis. The *Allegheny* Court held that the Webster County assessment practices violated the Equal Protection Clause even though they apparently did not violate West Virginia law. *Id. See also, e.g., Lucas*, 377 U.S. at 736-37 (holding that discriminatory scheme adopted by popular referendum never-

---

[17] *See* Respondents' Brief in Opposiiton at 11 (*Allegheny* "involved action by a State official directly in conflict with West Virginia State law requirements."); *Amici* Brief at 16.

[18] Thus, respondents could not be more mistaken in asserting that "[t]his Court acted in *Allegheny Pittsburgh* to *uphold* the law of West Virginia, more or less acting as, the final arbiter of State law." Respondents' Brief in Opposition at 11 (internal quotes omitted).

theless violated Equal Protection Clause). Similarly, the Court has consistently held that a violation of state law does not give rise to an equal protection challenge; state action may violate state law but not offend the Equal Protection Clause. *E.g., Snowden v. Hughes*, 321 U.S. 1, 10 (1944); *Nashville, Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. 362 (1940).[19] The Court stated the principle plainly nearly fifty years ago:

> [O]fficial action [of a state] is subject to constitutional infirmity to the same but no greater extent than if the action were taken by the state legislature. Its illegality under the state statute can neither add to nor subtract from its constitutional validity. Mere violation of a state statute does not infringe the federal Constitution. *And state action, even though illegal under state law, can be no more and no less constitutional under the Fourteenth Amendment than if it were sanctioned by the state legislature.*

Snowden v. Hughes, 321 U.S. at 11 (emphasis added). Even if the actions of the Webster County assessor and Board did violate West Virginia law—and they did not—that violation would not have made their actions more susceptible to challenge under the Equal Protection Clause than if they were acting in conformance with West Virginia law. Hence, the distinction respondents and *amici* seek to draw between *Allegheny* and this case is irrelevant.

[19] *Accord, e.g., Hoffman v. City of Warwick*, 909 F.2d 608, 623 (1st Cir. 1990) (fact that practice at issue was "contrary to state law did not transform an otherwise rational distinction into a violation of the Equal Protection Clause"); *Stern v. Tarrant County Hosp. Dist.*, 778 F.2d 1052, 1054 (5th Cir. 1985) (en banc) ("A decision that passes constitutional muster under the rational-basis test does not violate the equal protection clause simply because it violates a state . . . statute."), *cert. denied*, 476 U.S. 1108 (1986); *Ortega Cabrera v. Bayamon*, 562 F.2d 91, 102 (1st Cir. 1977) ("illegality of official conduct under local law 'can neither add to nor subtract from its constitutional validity' ") (quoting *Snowden*). *See also Archie v. City of Rachine*, 847 F.2d 1211, 1216-17 (7th Cir. 1988) (en banc) (same in context of Due Process Clause), *cert. denied*, 489 U.S. 1065 (1989).

The welcome stranger assessment provision of Proposition 13—like Webster County's welcome stranger assessment practice—must be assessed under *federal* standards of equality and rationality, not in relation to their compliance with state law. The contrary approach advocated by respondents would federalize, indeed constitutionalize, every violation of state law.[20] The Court has steadfastly rejected this result.[21]

Moreover, it would permit States to immunize their unconstitutional actions by simply codifying them. The States cannot define the content of the Equal Protection Clause. To survive scrutiny, the classification drawn by the State must itself be rational. But enacting the classification into law does not make it so:

> A State cannot deflect an equal protection challenge by observing that in light of the statutory classification all those within the burdened class are similarly situated. The classification must reflect pre-existing differences; it cannot create new ones that are supported by only their own bootstraps. "The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes."

[20] As the Fifth Circuit, sitting en banc, explained:

> If state law defines who is entitled to what treatment or which means to a chosen goal are rational, then all intentional violations of state law by state agencies would violate the fourteenth amendment: if the action were taken against a class it would offend equal protection . . . and if taken against an individual it would offend due process.

Stern v. Tarrant County Hosp. Dist., 778 F.2d at 1059.

[21] *E.g., DeShaney v. Winnebago County DSS*, 489 U.S. 189, 109 S.Ct. 998, 1007 (1989) (Due Process Clause "does not transform every tort committed by a state actor into a constitutional violation"); *Bishop v. Wood*, 426 U.S. 341, 349 & n.13 (1976); *Paul v. Davis*, 424 U.S. 693, 698-99 (1976).

Williams v. Vermont, 472 U.S. at 27, quoting *Rinaldi v. Yeager*, 384 U.S. 305, 308 (1966). *See also Browning*, 310 U.S. at 368 (holding that state tax law cannot "be insinuated into that meritorious conception of equality which alone the equal protection clause was designed to assure").

Proposition 13's welcome stranger provision must pass the same federal equal protection test applied to Webster County's welcome stranger assessment practices—a test, as petitioner explains, it cannot survive.

CONCLUSION

The Judgment of the California Court of Appeals should be reversed and Proposition 13's unfairly discriminatory property assessment methods declared violative of the Equal Protection Clause.

Respectfully submitted,

BRENT N. RUSHFORTH *
BRUCE J. ENNIS, JR.
ANTHONY C. EPSTEIN
ANN M. KAPPLER
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000
Counsel for Amici Curiae BIA and NAHB

December 23, 1991

* Counsel of Record